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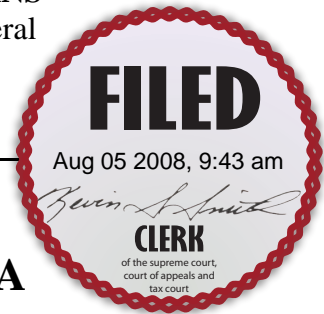
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**IN THE
COURT OF APPEALS OF INDIANA**

DEVAN WHITE,

Appellant-Defendant,

VS.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 49A04-0801-CR-3

APPEAL FROM THE MARION SUPERIOR COURT
CRIMINAL DIVISION, ROOM 2
The Honorable Robert A. Altice, Jr., Judge
Cause No. 49G02-0612-FA-231013

August 5, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Devan White (White), appeals his conviction and sentence for child molesting, as a Class A felony, Ind. Code § 35-42-4-3.

We affirm.

ISSUES

White raises two issues for our review, which we restate as:

- (1) Whether the trial court abused its discretion by not allowing him to withdraw his guilty plea;
- (2) Whether his sentence is inappropriate when the nature of his offense and his character are considered.

FACTS AND PROCEDURAL HISTORY

Sometime between August and December of 2005, White engaged in a sex act with D.T., a six-year-old child in Marion County, Indiana. On December 4, 2006, the State filed an Information charging White with two Counts of child molesting, as Class A felonies, I.C. § 35-42-4-3. White was arrested on the charges on February 9, 2007. On November 19, 2007, just prior to the commencement of a jury trial, White pled guilty pursuant to a plea agreement to one Count of child molesting, as a Class A felony. The plea agreement stipulated that the State would drop the remaining charge of child molesting, as a Class A felony, and that White's sentence be capped at twenty-five years of initial executed time. On December 5, 2007, the trial court held a sentencing hearing. Prior to hearing evidence, White asked that his guilty plea be withdrawn. White stated that he had felt pressured when he

entered his guilty plea because his attorney had informed him that his chance at winning was not good. He also stated that he felt like the process leading up to the day he pled guilty had been overwhelmingly fast and that he and his attorney were unprepared to go trial. The trial court acknowledged that White had received multiple continuances, stated that it had taken time to explain to White his rights and make sure that he understood what he was doing by pleading guilty, and that White had stated under oath that he had committed a sexual act with the six-year-old child. The trial court denied White's motion to withdraw his guilty plea and sentenced White to twenty-two years with the Department of Correction and an additional three years suspended to probation.

White now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. Withdrawal of Guilty Plea

White argues that the trial court abused its discretion by not permitting him to withdraw his guilty plea. Indiana Code section 35-35-1-4, provides in pertinent part:

(b) After the entry of a plea of guilty, or guilty but mentally ill at the time of the crime, but before the imposition of the sentence, the court may allow the defendant by motion to withdraw his plea of guilty, or guilty but mentally ill at the time of the crime, for any fair and just reason unless the state has been substantially prejudiced by reliance upon the defendant's plea. The motion to withdraw the plea of guilty or guilty but mentally ill at the time of the crime made under this subsection shall be in writing and verified. The motion shall state facts in support of the relief demanded, and the state may file counter-affidavits in opposition to the motion. The ruling of the court on the motion shall be reviewable on appeal only for an abuse of discretion. However, the court shall allow the defendant to withdraw his plea of guilty, or guilty but mentally ill at the time of the crime, whenever the defendant proves that withdrawal of the plea is necessary to correct a manifest injustice.

White brought his desire to withdraw his guilty plea to the attention of the trial court by a written statement in the Pre-Sentence Investigation Report, which read: “I withdraw my plea agreement because I was pressured and threatened to sign a plea. And I thought I knew my rights when I tru[ly] didn’t. I feel manipulated and out-witted by my coun[sel].”¹ However, this is not a sufficient verified written motion as required by Indiana Code section 35-35-4-1. White’s contention that there is nothing in the record showing that he was advised of how to properly file a motion to withdraw his guilty plea is of no merit. Furthermore, White had counsel throughout these proceedings, and, therefore his motion should have been submitted by and through his counsel of record. *See* Ind. Trial Rule 11(A) (“Every pleading or motion of a party represented by an attorney shall be signed by at least one [1] attorney of record in his individual name . . .”). By not filing an appropriate written and verified motion to withdraw his guilty plea, White has waived this issue. *See Flowers v. State*, 528 N.E.2d 57, 59 (Ind. 1988) (“Because appellant’s motion to withdraw his guilty plea was not in writing or verified, he has waived the issue.”).

II. *Appropriateness of White’s Sentence*

White also argues that his sentence is inappropriate when his character and the nature of the offense are considered. We have the authority to review the appropriateness of a sentence authorized by statute through Indiana Appellate Rule 7(B). That rule permits us to revise a sentence if, after due consideration of the trial court’s decision, we find that the

¹ The State contends that White has conceded that his request “was not made in writing pursuant to Indiana Code [section] 35-35-1-4(b).” (Appellee’s Br. p. 6). To the contrary, White stopped short of making such a

sentence is inappropriate in light of the nature of the offense and the character of the offender. *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007), *aff'd on reh'g*. Our supreme court has encouraged us to critically investigate sentencing decisions. *See, e.g., Walker v. State*, 747 N.E.2d 536, 538 (Ind. 2001). The purpose of the express authority to review and revise sentences is to ensure that justice is done in Indiana courts and to provide unity and coherence in judicial application of the laws. *Pruitt v. State*, 834 N.E.2d 90, 121 (Ind. 2005). Under this rule, the burden is on the defendant to persuade us that his or her sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2000).

We first note that White has pled guilty and been convicted of a Class A felony. The advisory sentence for a Class A felony is thirty years, with the possibility of a minimum sentence of twenty years or a maximum sentence of fifty years. I.C. § 35-50-2-4. The trial court sentenced White to twenty-two years, with an additional three years suspended to probation.

White's main contention is that his sentence is inappropriate because he has been treated for a mental or emotional disorder, which would account for two of his instances of criminal history that the trial court described as aggravating. However, since the trial court sentenced White to less than the advisory sentence, we find that a possible explanation for White's prior bad behavior falls short of demonstrating that he was deserving of a lesser sentence. Furthermore, by White's own contention, his mental or emotional disorder could not be an excuse for his prior conviction for theft, as a Class D felony.

concession, although he did contend that "there is nothing in the record to indicate that White was ever

As for the nature of the offense, White pled guilty to Count I as described in the Information, which stated that he “did perform or submit to deviant sexual conduct, an act involving the sex organ of [White] and the anus of D.T., when D.T. was then a child under the age of fourteen, specifically six (6) years old.” (App. p. 29; *see also* Tr. p. 84). D.T.’s grandmother testified at the sentencing hearing that the crime has made D.T. cry a lot and he has been forced to go to therapy. She also stated that the crime has affected her whole family. We conclude that White’s sentence is not inappropriate when his character and the nature of his offense are considered.

CONCLUSION

Based on the foregoing, we conclude that White has waived his opportunity to withdraw his plea of guilty, and that his sentence is not inappropriate.

Affirmed.

BAILEY, J., and BRADFORD, J., concur.